

IN THE MATTER OF

PHILIP ROUSSEAU

Appellant

v.

HOWARD COUNTY PLANNING BOARD,
WEGMANS FOOD MARKETS, INC., &
SCIENCE FICTION, LLC

Appellees

* BEFORE THE
* HOWARD COUNTY
* BOARD OF APPEALS
* CASE NO. BA 628-D

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DECISION AND ORDER

On December 9, 2008, the Board of Appeals convened to conduct a hearing on the merits of the administrative appeal of Philip Rousseau (the "Appellant"). The Appellant is appealing the Howard County Department of Planning and Zoning's ("DPZ") December 14, 2007 determination that F-07-208 is technically complete, based in pertinent part on an updated Adequate Public Facilities Ordinance ("APFO") roads/traffic study. The appeal is filed pursuant to Section 16.105(a) of the Subdivision and Land Development Regulations (the "Subdivision Regulations").

All members of the Board were present at the December 9, 2008 hearing and Chairman Hayes presided. Barry Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Appellant certified that notice of the hearing was advertised and that the property owner and adjoining property owners were notified as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

This case is a *de novo* appeal and is being conducted in accordance with Section 2.210(a) of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the Howard County Subdivision and Land Development Regulations, the General Plan for Howard County, the General Plan of Highways, and the Petition as submitted by the Appellant were incorporated into the record by reference.

Susan Gray, Esquire, represented Appellant Philip Rousseau. Richard Talkin and Sang Oh, Esquires, represented Appellees Wegmans Food Markets, Inc. and Science Fiction, LLC ("Wegmans"). Paul Johnson, Deputy County Solicitor, represented DPZ.

Background

In 2007 the Howard Research and Development Corporation (General Growth Properties) ("GGP") petitioned the Howard County Planning Board (the "Board") to amend a final development plan ("FDP") (FDP-117-A-II) by adding the phrase "full service food and grocery stores, and related uses, of 100,000 square feet or more" as a "permitted use" under Criteria 7D, "Employment Center-Industrial Land Use Areas." This Final Development Plan, F-07-208, encompasses a 181+/- acre parcel of "New Town" zoned land known as the Sieling Industrial Center, Section 1, Area 1. The subject property lies on the west side of Snowden River Parkway between MD 175 and Oakland Mills Road. After public hearing, the Board by letter dated September 6, 2007 informed GGP of its approval of the requested FDP amendment (the "Amended FDP"), stating it clarifies that large full service food and grocery stores, and related uses are a permitted use under Criteria 7D, "Employment Center-Industrial Land Use Areas."¹

¹ In BA Case No. 620-D, decided August 28, 2008, the Board of Appeals granted Wegmans' Motion to Dismiss Carvel Mays' appeal of the Planning Board decision to approve the amendment for lack of standing.

Wegmans also submitted a Site Development Plan ("SDP") – SDP-07-131 for the amended FDP to DPZ for its review and, eventually, for the Planning Board's final approval.² Additionally, Wegmans submitted a Final Subdivision Plan, F-07-208, for the proposed grocery store and the County processed this plan concurrently with the SDP. Pursuant to the Subdivision Regulations, Wegmans submitted a traffic impact analysis ("TIA") in the form of an updated APFO roads rest as part of its F-07-208 submission. By letter dated December 14, 2007, DPZ informed Wegmans of the Subdivision Review Committee's determination that F-07-208 was technically complete, subject to certain comments and concerns. According to the Technical Staff Report ("TSR") prepared for the Planning Board in its consideration of the SDP, DPZ's Development Engineering Division ("DED") and the Department of Public Works ("DPW") determined the F-07-208 Plan met APFO capacity and mitigation standards and that roads serving the project would be adequate.

Appellee Science Fiction, LLC, is the owner of Parcel "D-2" in the Sieling Industrial Center, Section 1, Area 1, where a large full service food and grocery store is permitted under the Amended FDP. Appellee Wegmans is a large full service food and grocery store proposing to construct a store on Science Fiction's property.

Appellant Philip Rousseau is a resident of Howard County who is opposed to the amended FDP. In this case, he is appealing the DPZ's December 14, 2007 letter approving in part the APFO roads rest for F-07-208.³ He contends that DPZ based its APFO approval decision on an erroneous traffic study. He claims to be aggrieved because his use and

² In BA Case No. 632-D, decided December 2, 2008, the Board of Appeals granted Wegmans' Motion to Dismiss the Appellants' appeal of the Planning Board's decision to approve this SDP for being untimely filed.

³ Appellants' petition incorrectly identifies the plan being appealed as the amended FDP and the SDP.

because his personal safety will be compromised.

Burden of Proof

Section 2.210(a)(4)(ii) of the Board of Appeals Rules of Procedure provides that "[I]n all other *de novo* appeals, the burden of proof is upon the appellant to show that the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law."

The Instant Case

The Appellant failed to present any evidence and/or testimony that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law during the course of the hearing. Wegmans moved for dismissal of the appeal in view of the fact that Appellant had not met his requisite burden of proof. The Board unanimously granted the Motion to Dismiss the appeal for the reason that the Appellant failed to show by substantial evidence that DPZ's December 14, 2007 determination that F-07-208 is technically complete, based in pertinent part on an updated APFO roads/traffic study was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law.

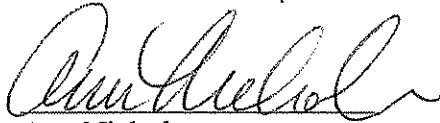
Order

Based upon the foregoing, it is this 8th day of January, 2009, by the Howard County Board of Appeals, **ORDERED:**

That the Petition of Appeal of Philip Rousseau in BA Case No. 628-D is hereby **DENIED**; and

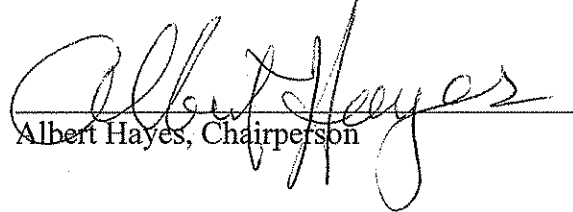
That the Howard County Department of Planning and Zoning's December 14, 2007 determination that F-07-208 is technically complete, based in pertinent part on an updated Adequate Public Facilities Ordinance roads/traffic study is hereby **AFFIRMED**.

ATTEST:

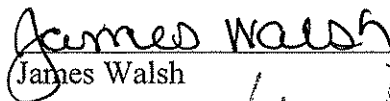


Ann Nicholson
Secretary

HOWARD COUNTY BOARD APPEALS

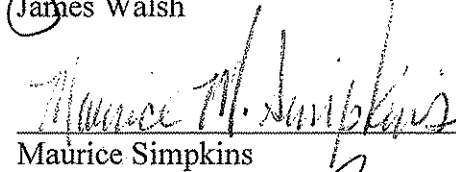


Albert Hayes, Chairperson



James Walsh

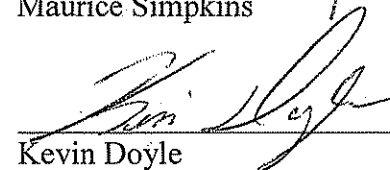
APPROVED AS TO FORM:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR



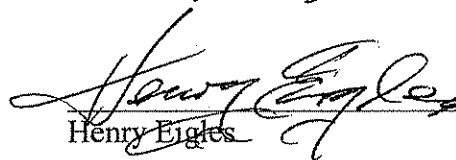
Maurice Simpkins



Barry Sanders
Assistant County Solicitor



Kevin Doyle



Henry Eagles